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No. 90-1831

Supreme Court, U.S.
FILED
JUN 21 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1990

JOHN T. MITCHELL,

Petitioner,

v.

G. SERVICES, INC., a corporation,

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL UNION NO. 29, an unincorporated association,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS IN AFFIRMING THE DISTRICT COURT'S DETERMINATION THAT PETITIONER'S CAUSE OF ACTION WAS BARRED BY THE STATUTE OF LIMITATIONS?

II. WHETHER THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS IN AFFIRMING THE DISTRICT COURT'S DETERMINATION THAT PETITIONER FAILED TO DEMONSTRATE THE ELEMENTS OF EQUITABLE ESTOPPEL TO JUSTIFY TOLLING THE STATUTE OF LIMITATIONS?

III. WHETHER THIS COURT SHOULD REJECT PETITIONER'S REQUEST TO RECONSIDER ITS HOLDING IN *DelCOSTELLO* DUE TO PETITIONER'S FAILURE TO RAISE THIS ISSUE WITH THE COURTS BELOW?

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JURISDICTION

Petitioner cites Title 28 U.S.C. §2101(c) and Supreme Court Rule 20.2 as conferring jurisdiction of this Court to review the judgment of the Court of Appeals. Neither 28 U.S.C §2101(c) nor Supreme Court Rule 20.2 confer jurisdiction upon a party to obtain review by this Court of a judgment of the Court of Appeals.

COUNTERSTATEMENT OF THE CASE

Respondents, G. Services, Inc. (hereinafter "G. Services") and Service Employees International Union, Local Union No. 29 (hereinafter "Local 29"), were parties to a collective bargaining agreement which covered a bargaining unit of employees employed by G. Services in Pittsburgh, Pennsylvania. Petitioner, John T. Mitchell, was employed by G. Services and was a member of the bargaining unit represented by Local 29 (Petition for Writ of Certiorari, p. 4a).

Petitioner was discharged from employment by G. Services on March 13, 1986, allegedly for sleeping while on the job (Petition, p. 20a). A grievance was filed with Local 29 seeking back pay and reinstatement (Petition, p. 20a).

During the time that the grievance was being processed by Local 29, Petitioner made an inquiry with John J. Sweeney, International President of Service Employees International Union (hereinafter the "International") (Petition, p. 21a). By letter dated March 21, 1986, Sweeney responded to Petitioner's inquiry (Petition, p. 26a). On April 25, 1986, Sweeney sent a follow-up letter to Petitioner regarding the status of his grievance (Petition, p. 25a).

Petitioner was reinstated by G. Services to his employment on March 14, 1987, and the grievance then focused on Petitioner's claim for lost wages (Petition, p. 20a).[1] On March 18, 1988, Local 29 President John B.

[1] Petitioner states at pages 8-9 of his Petition that he was reinstated to employment on March 14, 1987, "after success at arbitration, 25a". This statement is in error. At no time did Petitioner's grievance ever proceed to arbitration. Petitioner's reinstatement claim was resolved by agreement of the parties during the time that Petitioner's grievance was processed through the grievance procedure (Petition, pp. 6-7, 5a, 28a-29a).

Yoedt informed Petitioner by letter that Local 29 was refusing to arbitrate Petitioner's grievance for lost wages (Petition, p. 30a). Petitioner then wrote another letter to Sweeney dated October 23, 1988, regarding Local 29's decision not to arbitrate the grievance (Petition, p. 27a).

Sweeney responded to Petitioner's inquiry with a letter dated November 21, 1988, in which Sweeney advised that he was looking into the matter and that he would be in contact with Petitioner as soon as possible (Petition, p. 24a). There was no further contact between Petitioner and the Respondents, or between Petitioner and the International, until Petitioner commenced his action in District Court on September 1, 1989 (Petition, p. 6a).

Petitioner commenced an action against, *inter alia*, G. Services, Local 29 and the International under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185. The International was subsequently dismissed from the case by a voluntary Stipulation of the parties (Petition, p. 3). G. Services and Local 29 then filed motions for judgment on the pleadings and for dismissal, respectively, which the District Court treated as Motions for Summary Judgment.

By Opinion and Order dated August 15, 1990, the District Court granted summary judgment in favor of Respondents, G. Services and Local 29, and dismissed Petitioner's action. In reaching this decision, the District Court first rejected Petitioner's claim that the alleged violations represented a continuing violation (Petition, pp. 8a-9a), and concluded that the cause of action against Local 29 arose, if ever, on October 18, 1988 (Petition, p. 8a). The District Court then applied the holding of this Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), to determine that Petitioner's action, commenced

on September 1, 1989, was barred by the applicable statute of limitations (Petition, pp. 10a-11a). The District Court considered and rejected Petitioner's claims that principles of equitable estoppel applied 1) to toll the accrual of the cause of action (Petition, p. 14a, fn. 7); or 2) to toll the running of the limitations period (Petition, pp. 10a-14a).

A timely Notice of Appeal was filed by Petitioner to the United States Court of Appeals for the Third Circuit. By Judgment Order dated February 27, 1991, a panel of the Court of Appeals for the Third Circuit affirmed the judgment of the District Court for the reasons set forth in the District Court's Opinion (Petition, pp. 17a-18a).

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be dismissed inasmuch as Petitioner does not identify any ground upon which the decision of the Court of Appeals departed from the accepted course of judicial proceedings, such as to require the exercise of this Court's power of supervision. Petitioner's action was properly found to be time barred by the applicable statute of limitations. Moreover, Petitioner failed to demonstrate that the Court of Appeals erred when it affirmed the District Court's conclusion that Petitioner failed to establish the existence of the elements necessary for the application of equitable estoppel.

In addition, Petitioner's request that this Court reconsider its decision in *DelCostello v. International Brotherhood of Teamsters* should be rejected, inasmuch as Petitioner failed to raise this issue before the courts below.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONER'S CAUSE OF ACTION WAS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

This Court has previously determined that a cause of action under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, is subject to the six month statute of limitations set forth in Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). *DelCostello v. International Brotherhood of Teamsters, supra.* Petitioner concedes, as he must, that the decision of this Court in *DelCostello* controls this action (Petition, p. 10). The operative question raised by Petitioner's first issue then becomes when, if ever, Petitioner's cause of action arose.

The District Court held[2] that Petitioner's cause of action accrued, if ever, on October 18, 1988, when Petitioner was expressly informed by the President of Local 29 that the Local Union was refusing to arbitrate Petitioner's grievance. The District Court based this holding on the decision of the Court of Appeals for the Third Circuit in *Vadino v. A. Valey Engineers,* 903 F.2d 253, 260 (1990). In *Vadino,* the Court of Appeals held that a plaintiff's hybrid Section 301/duty of fair representation claim accrues on the date when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation. *Id.* The claim against the Union arises when the plaintiff receives notice that the Union will proceed no further with his grievance, or, if there has

[2] Inasmuch as the Judgment Order of the Court of Appeals affirmed the District Court's Opinion for the reasons set forth therein, the focus of this Brief will be on the District Court's Opinion.

been no explicit notice, when the futility of further Union appeals became apparent or should have become apparent. *Id.*

Based on the standard set forth in *Vadino, supra*, the District Court concluded that Petitioner knew, on October 18, 1988, that Local 29 would not proceed any further with his grievance, and accordingly, Petitioner's cause of action accrued, if ever, on that date.

The decision of the District Court is wholly consistent with an established line of cases decided by the Court of Appeals for the Third Circuit. *Hersh v. Allen Products Co., Inc.*, 789 F.2d 230, 232 (3rd Cir. 1986). The District Court's conclusion also fits within the framework established by the decision of this Court in *Clayton v. United Automobile Workers*, 451 U.S. 679, 101 S.Ct. 2088, 68 L.Ed.2d 538 (1981), in determining when a cause of action against a union under Section 301 accrues. In *Clayton*, this Court held that a union member's cause of action under Section 301 against his union for breach of the duty of fair representation accrues when the futility of further appeals to the union becomes apparent.

Petitioner, in fact, does not contest the conclusion of the District Court that his cause of action arose, if ever, on October 18, 1988. Rather, Petitioner seeks to assert that his cause of action somehow involves a continuing violation so that his cause of action does not violate the statute of limitations. However, the actions upon which Petitioner seeks to rely in establishing a continuing violation are not the actions of either Respondent herein nor their agents, but rather the actions of a representative of the International, a party whom the Petitioner agreed should be voluntarily dismissed from this action below.

Further, Petitioner has never identified how the facts of his case establish the elements of a continuing violation. The decision of the National Labor Relations Board in *Al Bryant, Inc.*, 260 NLRB 128, 134 (1982), relates to the determination of when a cause of action accrues. The appellate cases cited by Petitioner stand for the proposition that a continuing violation may, in certain circumstances, prevent an action from being time-barred. Nowhere does Petitioner identify how the facts of this case establish a continuing violation which would make the holdings in those cases relevant.

Thus, the District Court acted well within the bounds of the authority of decisions of this Court and the Court of Appeals in holding that Petitioner's cause of action arose, if ever, on October 18, 1988. Further, the Court of Appeals' affirmance of this determination is similarly well founded, and Petitioner has failed to identify any manner in which that decision deviates from established authority.

Accordingly, Petitioner's first ground for seeking the issuance of a Writ of Certiorari should be rejected.

II. THE COURT OF APPEALS CORRECTLY DECIDED THAT PETITIONER FAILED TO DEMONSTRATE THE ELEMENTS OF EQUITABLE ESTOPPEL TO JUSTIFY TOLLING THE STATUTE OF LIMITATIONS.

The District Court correctly concluded that Petitioner's claim of equitable estoppel was not applicable to the facts of the instant case. Relying upon the decision of the Court of Appeals for the First Circuit in *Demars v. General Dynamics Corp.*, 779 F.2d 95 (1985), the District Court set forth the elements required to warrant the application of equitable estoppel, including some conduct by the party sought to be estopped. The District Court reasoned that the conduct relied upon by Petitioner consisted entirely of conduct by the International and its representatives, and not any conduct attributable to the Respondents.

Petitioner does not even dispute the conclusion of the District Court, but rather continues to assert that the actions of the International are attributable to Local 29. Petitioner has failed to demonstrate how the Court of Appeals' affirmance of the District Court Opinion, that no evidence exists to attribute the actions of the International to Local 29, is a departure in any way from existing federal law.

Petitioner cites to the decision in *United States v. International Brotherhood of Teamsters*, 728 F.Supp. 1032 (S.D. N.Y. 1990), as authority for the proposition that an international union could bind its local affiliates to the terms of a consent decree. The salient difference between *U.S. v. IBT* and the instant case is that in *U.S. v. IBT*, the international union was a named defendant, and evidence of the strong centralization and control of the international union through its By-Laws and

Constitution over the affiliates was presented. In the instant case, by contrast, Petitioner consented to the voluntary dismissal of the International as a defendant, and Petitioner never sought to demonstrate that the International was an agent of Local 29. Thus, the District Court was correct to conclude that Petitioner failed to demonstrate a necessary element of equitable estoppel, that any actions of Local 29 caused Petitioner to be lulled into a false sense of security.

Accordingly, the District Court was correct in concluding that equitable estoppel could not apply to the facts of this case as a matter of law. The Petition for Writ fails to demonstrate any basis under Supreme Court Rule 10.1(a) upon which a Writ of Certiorari should issue based on this ruling, and the Writ should be dismissed.

III. PETITIONER'S REQUEST THAT THIS COURT SHOULD RECONSIDER ITS HOLDING IN *DelCOSTELLO* SHOULD BE REJECTED INASMUCH AS THIS ISSUE WAS NEITHER RAISED, PRESERVED NOR DECIDED BELOW.

In his Petition for Writ, Petitioner urges this Court to re-examine its reasoning in *DelCostello, supra* (Petition, p. 17). Petitioner does not raise this matter as a separate issue, but rather subsumes this request within his argument regarding the first issue. Petitioner raises this issue for the first time before this Court, never having raised this issue before the Trial Court or the Court of Appeals.

This Court has consistently followed a policy of declining to decide issues presented for the first time before this Court. *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 486, 106 S.Ct. 748, 88 L.Ed.2d 846, 854 (1986). In recognition of this well-established principle, this Court should reject Petitioner's request to reconsider its holding in *DelCostello* on the basis that this request was neither raised nor decided below.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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